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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PUBLIC CITIZEN AND SIERRA CLUB,

Petitioners,

v.

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the role of the President in signing a trade agreement and submitting it to Congress for approval preclude judicial review of an agency's failure to comply with the National Environmental Policy Act's mandate that the agency include an environmental impact statement in its final recommendation to enter into the trade agreement, even where the lawsuit does not challenge or seek any relief with respect to the President's decisions or actions concerning the trade agreement?

PARTIES

In addition to Petitioners Public Citizen and Sierra Club, Friends of the Earth was a respondent below.

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OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE,

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INTRODUCTION

This case raises important issues concerning the power of the federal courts to review a federal agency's refusal to comply with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(C), with respect to trade agreements, legislative proposals, and other agency actions that require presidential involvement. Although there is no serious dispute that NEPA's plain language requires that respondent prepare an environmental impact statement ("EIS") on the North American Free Trade Agreement ("NAFTA"), the court of appeals ruled that the courts lack the power to declare that respondent has violated its legal obligation to comply with this requirement. The court reached this result by extending this Court's decision in

Franklin v. Massachusetts, 112 S. Ct. 2767 (1992), to preclude a challenge to an agency's failure to comply with an independent statutory obligation, even though this lawsuit did not ask the court to review or set aside the President's decision.

The decision below is not limited to NAFTA or even to trade agreements generally, but rather would likely render NEPA's entire legislative EIS requirement judicially unenforceable. In reaching this result, the court of appeals disregarded more than two decades of NEPA jurisprudence, Executive Branch practice, and congressional understanding. Moreover, the result below is in conflict with the result in *Specter v. Garrett*, 995 F.2d 404 (3d Cir. 1993), which the government has asked this Court to review. *Dalton v. Specter*, No. 93-289 (petition filed August 23, 1993). Because of the court of appeals' departure from well-settled NEPA precedent and the confusion surrounding the applicability of *Franklin* to actions seeking enforcement of agencies' independent statutory obligations, this Court should review the decision below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, which has not yet been reported, is reproduced at App. 1a-11a. The opinion and order issued by the United States District Court for the District of Columbia, which are reported at 822 F. Supp. 21, are reproduced at App. 12a-32a.

JURISDICTION

The court of appeals' judgment was issued on September 24, 1993. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Pertinent provisions of the Administrative Procedure Act, the National Environmental Policy Act, and the Council on Environmental Quality regulations are set forth at App. 35a-39a.

STATEMENT OF THE CASE

A. The Framework for Negotiating Trade Agreements.

Under Congress's constitutional power to regulate foreign commerce, Art. I, § 8, Congress could (and initially did) establish trade policy by setting tariffs in statutes. J. Jackson, *The General Agreement on Tariffs & Trade in U.S. Domestic Law*, 66 Mich. L. Rev. 249, 255 (1967). Alternatively, Congress could (as it eventually did) delegate some of its foreign commerce powers to the Executive Branch by authorizing it to set tariffs within certain limits and to enter into international trade agreements, subject to congressional approval.

The current Trade Acts delegate principal responsibility for negotiating trade agreements to the respondent Office of the U.S. Trade Representative ("USTR"), whose top four officials are appointed as ambassadors by the President with the advice and consent of the Senate. 19 U.S.C. § 2171(b), (c)(1)(C), (c)(2) & (4). The Office is statutorily charged not only with conducting international trade negotiations, but also with developing and coordinating the implementation of U.S. international trade policy and imposing retaliatory trade sanctions on other countries that violate trade agreements or impose unjustifiable burdens on U.S. commerce. *Id.* §§ 2171(c)(1)(A),(C)-(D); 2411-2417. In light of its statutory duties, the Office recognizes that it is "an agency in the Executive Office of the President." 15 C.F.R. § 2001.1(a); *see also id.* pts. 2004 & 2005 (agency subject to the Freedom of Information Act and Privacy Acts).

Under the Trade Acts, the President may set tariffs under certain conditions, but trade agreements addressing matters other than tariffs must be approved by both Houses of Congress before they may become effective. 19 U.S.C. § 2903. If the President complies with certain congressional notification and consultation requirements with respect to a

nontariff trade agreement entered into (*i.e.*, signed) prior to June 1, 1993, then the Trade Acts and congressional rules require Congress to follow fast-track procedures that prescribe tight time frames for congressional consideration of the agreement. *Id.* §§ 2191-2194, 2902-2903; *see also* Pub. L. No. 103-49, 107 Stat. 239 (1993) (extending fast-track procedures to Uruguay Round negotiations under the General Agreement on Tariffs and Trade, if President notifies Congress of intent to enter into the agreement no later than December 15, 1993, and the President signs that Agreement before April 16, 1994). Specifically, if the President notifies Congress at least 90 calendar days before he enters into a trade agreement, then he may thereafter submit legislation approving and implementing that agreement, which Congress must adopt or reject within 90 legislative days. 19 U.S.C. §§ 2191(c) & (e), 2903(a) (90 legislative days if revenue measures are included; 60 legislative days for other implementing legislation). Under fast-track procedures, no amendments may be made either to the trade agreement or to its implementing legislation, legislative debate is limited to 20 hours in each House, and a prompt floor vote is assured. *Id.* §§ 2191(d)-(g).

B. NAFTA.

In June 1991, the U.S. entered into trilateral negotiations with Mexico and Canada to establish a North American free trade zone. *See* 56 Fed. Reg. 32,454-55 (July 16, 1991). The Office of the U.S. Trade Representative coordinated the U.S. position and represented the United States in the negotiations.

In response to widespread concerns that a NAFTA would have adverse environmental effects in the U.S.-Mexican border area, and that it would make domestic health and environmental standards vulnerable to challenge as unfair trade barriers, the Office prepared both a draft and a final *Review of U.S.-Mexico Environmental Issues* during the first seven months of the NAFTA negotiations. That review

acknowledged that a NAFTA could have significant environmental effects particularly in the border area, where air and water quality already suffer from trade-induced development. However, the review did not assess the environmental effects of the final NAFTA or any other particular draft of it, but rather highlighted generic environmental issues arising in the negotiations. For this reason, neither the Office nor anyone else has ever contended that the review meets NEPA's EIS requirements.

In August 1992, the USTR and her counterparts announced that they had reached a final agreement on NAFTA, and in early September, the Office released a text of that Agreement to Congress and the public. On September 18, 1992, the President officially notified Congress of his intent to sign NAFTA, thereby commencing the 90-day waiting period under the fast-track procedures. 57 Fed. Reg. 43,603 (Sept. 21, 1992). On October 7, 1992, the USTR and her counterparts initialed the final NAFTA text, and President Bush signed that Agreement on December 17, 1992.

Since taking office, President Clinton has indicated that he will seek approval of NAFTA in its current form upon the negotiation of certain supplemental agreements, which have now been concluded. Although one of the supplemental agreements concerns enforcement of domestic environmental laws and enhancement of environmental protection and cooperation among the NAFTA countries, it does not change NAFTA itself in any respect. Thus, the President has not provided Congress with another 90-day notice for the supplemental agreements, nor does he intend to do so. Because the President has not yet submitted NAFTA and its implementing legislation to Congress, the 90 legislative-day period for congressional consideration has not begun.

The final NAFTA is a comprehensive trade agreement that establishes principles and rules that will govern North

American trade. It will have a number of significant environmental effects. First, NAFTA will likely lead to additional development in northern Mexico, which will have adverse environmental effects on both sides of the border. Second, it will increase trade-related truck and other land transportation, which will increase air pollution in all three countries. Third, NAFTA establishes rules for evaluating whether domestic food safety and other health and environmental standards impose impermissible trade barriers. NAFTA Ch. 7, subch. B & Ch. 9. If NAFTA is approved, then the U.S. will be obligated, as a matter of international law, to bring its laws and regulations into conformity with NAFTA. If it fails to do so, then another country may challenge that failure under NAFTA's dispute settlement procedures, and may be authorized to impose trade sanctions against the U.S., thereby creating enormous political pressure to change the offending measure. Ch. 20. Depending on the precise meaning of NAFTA's standards provisions, NAFTA may jeopardize a broad range of domestic measures, such as recycling requirements, fuel economy rules, automobile emission standards, pesticide residue bans, and restrictions on the transportation of hazardous materials. Fourth, by reducing tariffs and other trade barriers in some economic sectors but not others, NAFTA creates incentives for certain types of development, which will, in turn, have significant environmental impacts. For example,. NAFTA's energy chapter expressly permits incentives for oil and gas exploration, but not for renewable energy or energy efficiency, which will increase development of nonrenewable energy sources in all three countries. Art. 608(1).

C. The Prior Litigation.

Because of their concerns that the Office was not properly considering environmental issues in the NAFTA negotiations, as well as in the still-ongoing Uruguay Round of negotiations under the General Agreement on Tariffs and Trade ("GATT"), petitioners made a written demand to the Office in July 1991 for preparation of EISs on the two

agreements. The National Environmental Policy Act requires all federal agencies to include EISs in "every recommendation or report on proposals for legislation or other major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The binding regulations issued by the Council on Environmental Quality ("CEQ") define "federal actions" to include "treaties and international conventions or agreements" and "proposals for legislation" to include "requests for ratification of treaties." 40 C.F.R. §§ 1508.17, 1508.18(b)(1). Despite the fact that federal agencies had prepared EISs on treaties and international agreements under every President since NEPA became effective in 1970, ranging from the Panama Canal Treaty to the Montreal Protocol on Substances that Deplete the Ozone Layer to the Micronesian Compact of Free Association, the Office had not begun preparation of EISs on NAFTA or the Uruguay Round.[1]

In August, 1991, after the Office made it clear that it had no intention of preparing such EISs, petitioners filed a lawsuit so that the Office would have sufficient time to prepare the EISs in response to a court order. In the district court, the Office admitted that it had never prepared an EIS on a trade agreement and that it would not prepare EISs on either NAFTA or the Uruguay Round, based on its belief that NEPA is inapplicable to trade agreements, no matter how significant their environmental effects. The district court dismissed the case on the grounds that, because neither NAFTA nor the Uruguay Round had yet been finally concluded, petitioners had not linked the effects of specific trade agreements to their members, and the controversy was not ripe. 782 F. Supp. 139, 142-43 (D.D.C. 1992).

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[1]Petitioners filed 19 such EISs as exhibits, and cited to several others.

On August 7, 1992, the court of appeals affirmed the dismissal of the complaint without reaching the standing issue or the merits. The court held that petitioners had failed to identify a *final* action that could be challenged under the Administrative Procedure Act ("APA"), since neither trade agreement had yet been concluded. 970 F.2d 916 (1992). The thrust of the court's opinion was that petitioners were too early in making their challenge, not that they would never be able to obtain judicial review of the Office's noncompliance with NEPA with respect to a final trade agreement.

D. This Litigation.

After the Office announced that it had reached a final NAFTA agreement and provided the NAFTA text to Congress, petitioners brought this lawsuit, under 28 U.S.C. § 1331, seeking a declaration that the Office had violated NEPA by failing to prepare an EIS on NAFTA and an order directing the Office to prepare such an EIS. In this litigation, petitioners did not, in any way, challenge the validity of NAFTA itself, or the President's decision to sign NAFTA. Nor did they seek to prevent the submission of NAFTA to Congress or Congress's consideration or approval of the Agreement.

On June 30, 1993, the District Court for the District of Columbia ruled in petitioners' favor, holding that "the plain language of the NEPA makes it a foregone conclusion that the [Office] must prepare an EIS on the NAFTA." App. 28a. Unlike the prior litigation, the court found the case appropriate for review because NAFTA had been finalized. App. 16a-17a. Addressing the government's argument that, under this Court's decision in *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992), this case challenged actions of the President, not the Office, the court examined NEPA, the CEQ regulations, and the case law. App. 18a-21a. Under these authorities, the district court concluded that the Office's failure to prepare an EIS on the NAFTA is reviewable under

the APA because the Office "is charged by statute with the responsibility for conducting international trade negotiations," and, "in substantial part, negotiated and drafted the NAFTA," even though the President signed it and will submit it to Congress for approval. App. 18a.[2]

Based on this opinion, the court issued a declaratory judgment that the Office must prepare an EIS on NAFTA and ordered the Office to prepare one forthwith. App. 33a-34a. It did not require that the EIS be prepared prior to the submission of NAFTA to Congress for approval, nor did it issue any injunctive relief forbidding the President from submitting NAFTA, or Congress from considering and approving it, without an EIS.

On September 24, 1993, without addressing the merits, standing, or the Office's separation of powers arguments, the court of appeals, relying exclusively on *Franklin*, reversed the district court's decision on the ground that "NAFTA is not 'final agency action' under the APA... and therefore is not reviewable by this court." App. 3a. According to the court, because only the President has the power to enter into NAFTA and to submit it to Congress for approval, NAFTA's effects are derived from the President's actions, and thus, under *Franklin*, no agency actions relating to the NAFTA may be challenged under the APA. App. 6a.

In responding to petitioners' contention that extending *Franklin* to this case would spell the death knell for judicial review of legislative EIS cases, the majority claimed that

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[2]The district court also rejected the Office's other arguments that the fast-track procedures relieve the Office of its NEPA obligations, App. 30a n.15, that NEPA's legislative EIS requirement violates the doctrine of separation of powers, App. 21a-22a, and, despite the extensive demonstration of harm in petitioners' lengthy affidavits and supporting exhibits, that petitioners lacked standing. App. 23a-28a.

review would be unavailable only where "the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties." App. 7a. However, because the President has the constitutional power to submit legislation to Congress on behalf of the Executive Branch, *see* U.S. Const. art. II, § 3, cl. 1, it appears likely that no legislative EISs would ever be judicially reviewable under the decision below.

Judge Randolph filed a concurring opinion, suggesting that, if language in *Franklin* is taken literally, there would still be no *final* agency action subject to review even where an agency (as opposed to the President) submits a legislative proposal directly to Congress. App. 9a-10a. In Judge Randolph's view, such a legislative proposal would not affect the parties until Congress enacted a bill embodying the proposal, and the President signed it. App. 10a. However, he noted the conflict between that result and *Kleppe v. Sierra Club*, 427 U.S. 390, 406 n.15 (1976), in which this Court identified "'the time at which a court enters the process' to be 'when the report or recommendation on the proposal is made, and someone protests either the absence or the adequacy of the final impact statement.'" App. 11a. Elaborating on this tension, Judge Randolph observed:

> The nub of the problem is that judicial review under the APA demands "final agency action" whereas the duty to prepare an impact statement arises earlier. The main objective of an impact statement is to ensure that the decisionmaker considers environmental effects prior to taking action.

Id. He concluded by noting that the courts would ultimately need to reconcile "*Franklin*'s direct-effects-on-the-parties test, as applied to NEPA suits . . . with the portion of *Kleppe v. Sierra Club*" identifying the appropriate time for judicial review in NEPA cases. *Id.* This petition seeks such a reconciliation.

Although the President has not yet submitted NAFTA to Congress, it is possible that he will do so and that Congress will act before this case is finally resolved. However, such congressional action would not render this case moot because it raises the threshold question of whether NEPA's EIS requirement applies at all to trade agreements. The court of appeals' decision effectively closes the gate to judicial resolution of that issue until this Court decides the effect of *Franklin* on reviewability of this type of EIS case. Moreover, because there is a limited time within which challenges can be brought to NEPA compliance on trade agreements, it is unlikely that this issue will ever be completely resolved by the courts with respect to a completed trade agreement before Congress acts on the agreement. For these reasons, even if this controversy becomes moot with respect to NAFTA, it would be capable of repetition yet evading review for the Uruguay Round (on which petitioners have already sued and still seek an EIS) and other future trade agreements.

REASONS FOR GRANTING THE WRIT

This Court should review the court of appeals' decision for three related reasons. First, the court of appeals' extension of *Franklin* to preclude judicial review of an agency's NEPA compliance runs counter to more than two decades of federal court precedent, Executive Branch practice, and congressional understanding of judicial review under NEPA. Second, this Court's review is needed to clarify the lower courts' confusion in applying *Franklin* to agencies' violations of their independent procedural obligations. More specifically, this decision conflicts with the Third Circuit's decision in *Specter v. Garrett*, 995 F.2d 404 (1993), allowing judicial review of agencies' procedural violations in connection with the President's base closing decisions, which the government has asked this Court to review. *Dalton v. Specter*, No. 93-289 (filed August 23, 1993). Third, the court of appeals misapplied *Franklin* to preclude challenges to an agency's failure to comply with its

independent statutory obligations, where that failure is not being used to challenge any presidential action.

A. The Decision Below Is Contrary To More Than Two Decades Of NEPA Understanding And Practice By All Three Branches Of Government.

This case warrants Supreme Court review because the court of appeals' decision runs directly counter to the three branches' longstanding understanding of judicial review of NEPA compliance with respect to legislative EISs and unsettles federal agencies' and the courts' obligations under NEPA.

1. *Two Decades of Judicial Review.* The decision below conflicts with two decades of judicial review under NEPA. For more than two decades, the federal courts have consistently construed NEPA to allow judicial review of EISs in connection with both major federal actions and legislative proposals, regardless of whether the underlying action involves presidential authority. They have done so under the logic of one of this Court's early NEPA decisions -- *Kleppe v. Sierra Club*, 427 U.S. 390, 406 n.15 (1976), which established that the time for judicial intervention is "when the report or recommendation on the proposal is made, and someone protests either the absence or the adequacy of the final impact statement." This Court focused on the agency's actions in issuing its report or recommendation, and acknowledged that both the obligation and judicial review arise at the proposal stage, rather than when the proposal becomes effective or adversely affects the parties. Since *Kleppe*, an agency's failure to issue an EIS with its report or recommendation has consistently been considered sufficiently final to be reviewable under the APA, even where some other step must be taken before the action will directly injure the plaintiffs. *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989) (Court reviewed NEPA compliance with respect to agency permit for

development even though agency had to approve a subsequent development plan before construction could begin); *see also Defenders of Wildlife v. Lujan*, 112 S. Ct. 2130, 2142-43 n.7 (1992) (*dicta*) (person living adjacent to proposed dam site has standing to challenge licensing agency's failure to prepare EIS, "even though he cannot establish with any certainty that the Statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years").

Until now, the courts have not carved out an exception for legislative EISs. Instead, they have recognized that "NEPA establishes the environmental impact statement requirement for proposals for legislation in part to ensure that the public has an opportunity to participate meaningfully in decisionmaking at the administrative and legislative levels," and not simply to serve as a legislative aid. *Izaak Walton League v. Marsh*, 655 F.2d 346, 365 (D.C. Cir.), *cert. denied*, 454 U.S. 1092 (1981). Accordingly, federal courts have reviewed challenges to agencies' compliance with NEPA's legislative EIS requirement once the agencies have made their recommendations on the legislative proposal, even though Congress may change the proposal or choose not to enact it. *See, e.g., id.*; *Realty Income Trust v. Eckerd*, 564 F.2d 447 (D.C. Cir. 1977); *Natural Resources Defense Council v. Lujan*, 768 F. Supp. 870 (D.D.C. 1991). Indeed, in one case, the Ninth Circuit reviewed a challenge to the adequacy of the agency's announced procedure for issuing a legislative EIS *before* the agency issued its legislative proposal. *Trustees for Alaska v. Hodel*, 806 F.2d 1378 (9th Cir. 1986) (judicial review of agency's plan to release legislative EIS without first obtaining public comment granted before agency issued legislative proposal or EIS).

Similarly, the courts have entertained NEPA cases concerning federal agencies' recommendations for legislative designations of areas to be accorded wilderness protection, even though Congress must pass a law affording that protection. *Idaho Conservation League v. Mumma*, 956 F.2d

1508 (9th Cir. 1992); *California v. Bergland*, 483 F. Supp. 465 (E.D. Calif. 1980), *modified*, *California v. Block*, 690 F.2d 753 (9th Cir. 1982); *Colorado Environmental Coalition v. Lujan*, 803 F. Supp. 364 (D. Col. 1992). In some of these cases, including one decided after *Franklin*, the pertinent statute required the agency to give its recommendation to the President who had the sole authority to submit proposed wilderness designations to Congress. Wilderness Act, 16 U.S.C. § 1132(b)-(e); *California v. Block*, *supra*; *Colorado Environmental Coalition*, *supra*. Even where the President actually modified the agency's proposal before submitting it to Congress, the President's intervening role did not render the NEPA claim unreviewable. *California v. Bergland*, 483 F. Supp. at 472; *California v. Block*, 690 F.2d at 758. Moreover, the courts have reviewed agencies' compliance with procedures prescribed in the CEQ regulations for EISs on statutorily mandated agency reports to Congress, even though Congress must take some action before the recommendations contained in the reports are implemented. *Trustees for Alaska*, *supra*; *NRDC v. Lujan*, *supra*.

In a subset of legislative EIS cases concerning appropriation requests, several lawsuits wound their way through the federal courts (including this Court) without any suggestion that the courts lacked authority to decide them. *Andrus v. Sierra Club*, 442 U.S. 347 (1979); *Environmental Defense Fund v. Tennessee Valley Authority*, 468 F.2d 1164 (6th Cir. 1972). Those cases raised the question of whether NEPA requires agencies to prepare legislative EISs on their appropriation requests, which are, under the Constitution and as a matter of practice, submitted to Congress by the President. Although *Andrus* ultimately held that NEPA does not apply to appropriation requests, this Court never questioned its jurisdiction to reach this conclusion because the lawsuit challenged only the agency's NEPA compliance, not the President's budget.

Courts have also considered the merits of challenges

to agencies' NEPA compliance, even where the underlying action concerned military decisions or matters undertaken pursuant to international agreements.[3] Although these military and foreign affairs actions fall under the President's

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[3]*See, e.g., Environmental Defense Fund v. Massey*, 986 F.2d 528 (D.C. Cir. 1993) (failure to prepare EIS on incinerator in Antarctica); *No-Gwen Alliance, Inc. v. Aldridge*, 855 F.2d 1380 (9th Cir. 1988) (adequacy of EIS on emergency network of radio towers); *Romer v. Carlucci*, 847 F.2d 445 (8th Cir. 1988) (*en banc*) (adequacy of EIS on deployment of MX missiles pursuant to presidential basing recommendation approved by Congress); *Wisconsin v. Weinberger*, 745 F.2d 412 (7th Cir. 1984) (agency's failure to prepare supplemental EIS on submarine communications system President decided to deploy); *Sierra Club v. Adams*; 578 F.2d 389 (D.C. Cir. 1978) (adequacy of EIS on U.S. participation in construction of Pan American highway pursuant to international agreement); *Concerned About Trident v. Rumsfeld*, 555 F.2d 817 (D.C. Cir. 1977) (adequacy of EIS on atomic missile submarine system); *Greenpeace USA v. Stone*, 748 F. Supp. 749 (D. Haw. 1990), *appeal dismissed as moot*, 924 F.2d 175 (9th Cir. 1991) (failure to prepare EIS on removal of chemical weapons from Germany pursuant to presidential agreement, although EIS prepared on weapons' destruction and environmental analysis done on their transport on high seas); *NORML v. Department of State*, 452 F. Supp. 1226 (D.D.C. 1978) (failure to do EIS on U.S. effects of U.S. participation in Mexican herbicide spraying program); *People of Enewetak v. Laird*, 353 F. Supp. 811 (D. Hawaii 1973) (failure to prepare EIS on nuclear test program); *see also Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 796 (D.C. Cir. 1971) (court had jurisdiction to decide adequacy of EIS on underground nuclear test, but refused to do so on an expedited basis).

commander-in-chief or foreign affairs authority, and, in many situations, the President actually made the underlying decision, the courts have reviewed challenges to the *agency's* compliance with NEPA in connection with its role leading up to or implementing the President's decision.

2. *Executive Branch Practice*. The court of appeals' decision also defies two decades of Executive Branch practice of applying NEPA to agency recommendations on matters within the President's decisionmaking authority. Most significantly, while the CEQ regulations exclude the President from NEPA, they do not exclude all actions in which the President has a role. 40 C.F.R. § 1508.12. To the contrary, the CEQ regulations expressly include "treaties and international conventions or agreements" in the list of major federal actions subject to NEPA's EIS requirement, *id.* § 1508.18(b)(1), and specifically state that "[p]roposals for legislation include requests for ratification of treaties." *Id.* § 1508.17. Furthermore, the CEQ regulations envision that judicial review of agency compliance with those regulations, which petitioners sought in their complaint, would be available once the agency has either filed a final EIS or made a final decision not to do so, as the Office has done with respect to NAFTA. *Id.* § 1500.3.[4]

The CEQ has further reinforced the applicability of NEPA to legislative EISs in its identification of the agency action that triggers the legislative EIS requirement:

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[4]Executive Order 11,991, § 2(q), 3 C.F.R. 123 (1977 Comp.), expressly directs federal agencies to comply with the CEQ regulations except where compliance would be inconsistent with statutory requirements, and the CEQ regulations themselves state that they are binding on all federal agencies. 40 C.F.R. § 1500.3. This Court has stated that the CEQ regulations are "entitled to substantial deference." *Andrus v. Sierra Club*, 442 U.S. at 358.

> "Legislation" includes a bill or legislative proposal to Congress *developed by or with the significant cooperation and support of a Federal agency* . . .. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation.

Id. § 1508.17 (emphasis added). Thus, under the CEQ regulations, the focus is not on the act of submitting the legislative proposal to Congress, but on the development of that proposal. Where an agency lends the requisite "significant cooperation and support" to the development of a legislative proposal, the CEQ regulations obligate it to prepare a legislative EIS, and, under the CEQ regulations, the agency can be sued if it fails to do so. *Id.* § 1500.3. Indeed, in many court challenges to federal agencies' compliance with NEPA regarding legislative-type EISs, the Executive Branch has not even questioned the federal courts' power to hear the challenges. *See Andrus*, *supra*; *EDF v. TVA*, *supra*; *Realty Income*, *supra*. Similarly, in cases concerning EISs on military and foreign affairs matters that could be said to fall within the President's constitutional authority, the government generally submits to the jurisdiction of the courts, even where the President plays a direct role in the underlying action. *See*, *e.g.*, *Wisconsin v. Weinberger*, *supra*; *Sierra Club v. Adams*, *supra*.

3. *Congressional Understanding*. Although preclusion of judicial review is a question of congressional intent, the court of appeals held that judicial review is precluded in NEPA cases in which the President has a role in the underlying action, even though nothing in NEPA provides the slightest hint that Congress intended to have the courts accord different treatment to different categories of EISs. To the contrary, NEPA's language and two decades of congressional treatment of NEPA suggests that Congress never intended to create such an exception to judicial review.

To begin with, NEPA imposes nondiscretionary duties on federal agencies of the sort that have traditionally been subject to judicial review. Thus, NEPA requires all federal agencies to include an EIS "in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). On its face, this provision imposes a mandatory obligation on federal agencies to prepare EISs on actions that come within its terms. *See Calvert Cliffs Coordinating Committee v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971). Since Congress drafted NEPA with the knowledge that the APA enables federal courts to hear challenges to an agency's violation of such mandatory obligations, judicial review is available in the absence of a clear congressional intent to the contrary.

Moreover, NEPA makes no distinction among agencies' EIS obligations, depending on whether they relate to actions that an agency may take without legislation or to legislative proposals. NEPA's plain language, which begins with the legislative EIS requirement, reveals that Congress plainly anticipated that *agencies* would prepare EISs when they develop reports or recommendations on legislative proposals. Congress obviously knew that the President has the constitutional authority to recommend legislation, U.S. Const. art. II, § 3, cl. 1, yet it imposed the legislative EIS requirement on the agencies that develop and make reports and recommendations on legislation. By imposing this requirement on agencies, whose actions may be reviewed under the APA, NEPA's plain language provides evidence of congressional intent to allow judicial review of an agency's violations of NEPA in connection not only with major federal actions, but also with respect to legislative proposals.

This understanding is confirmed by Congress's express, but limited, exemptions from NEPA of certain actions in which the President has a role. For example, Congress has enacted NEPA exemptions for base closing

decisions, which are, by statute, made by the President, as well as for a statutorily mandated presidential report to Congress recommending a particular MX missile basing system. *See, e.g.*, Defense Base Closing & Realignment Act of 1990, Pub. L. No. 101-510, § 2905(c), 104 Stat. 1815 (1990) (base closing decisions); Dep't of Defense Appropriations Act of 1983, Pub. L. No. 97-377, 96 Stat. 1847-48 (1982) (MX missile basing systems). These exemptions would be wholly unnecessary if the court of appeals were correct in concluding that the President's decisionmaking authority eviscerated the power of the courts to enforce an agency's NEPA's obligations, but obviously Congress did not see it that way. Indeed, the Solicitor General recently conceded that Congress expressly exempted base closing decisions from NEPA, while allowing NEPA challenges to implementation of those decisions, because "it was necessary for Congress to draw an explicit line between permissible and prohibited NEPA suits." Government's Petition for a Writ of Certiorari in *Dalton v. Specter*, No. 93-289, at 25 n.20 (filed August 23, 1993).

* * *

For the past 23 years, the courts, consistent with congressional intent and Executive Branch practice, have entertained NEPA challenges to agency recommendations on matters on which the President has the final decisionmaking authority. In doing so, they have followed the plain language of NEPA requiring *agencies* to include EISs in their recommendations on major federal actions and on legislative proposals and the heretofore unquestioned tenet of *Kleppe*, 427 U.S. at 406 -- that courts may review an *agency's* failure to include an adequate EIS in its recommendation on such a proposal. The fact that the President may have ultimate constitutional authority over the action, or may have some further action to take, has never precluded such review.

In holding that judicial review is precluded even where the agency has taken the steps laid out in *Kleppe* for

bringing APA challenges, the court of appeals' decision sharply diverges from *Kleppe* and the longstanding practice under it. Not only does this decision defy more than two decades of NEPA practice and jurisprudence, but it effectively nullifies judicial review of NEPA's legislative EIS requirement and, quite possibly, of NEPA cases involving presidential decisions in other contexts. As Judge Randolph acknowledged in his concurrence, the inconsistency between *Kleppe* and the application of *Franklin* below needs to be reconciled, App. 11a, which can only be done by this Court.

B. Review is Necessary to Resolve the Lower Courts' Conflict in Applying *Franklin* to Agencies' Compliance with their Independent Statutory Obligations.

Review is also needed because the lower courts have reached inconsistent results in applying *Franklin* to challenges to agencies' violations of their procedural obligations in connection with matters in which the President has some involvement.

The pertinent portion of *Franklin* addressed the State of Massachusetts's attempt to have the President's census calculations set aside on the grounds that the Secretary of Commerce's report, on which those calculations were based, was arbitrary and capricious in violation of the APA. This Court concluded that, under the applicable census statute, the President had the final decisionmaking authority with respect to the decennial census calculations that he transmitted to Congress, and that the Secretary of Commerce simply made a recommendation to him. On that basis, and because the Court held that the President is not an agency subject to APA review, the Court held that Massachusetts could not obtain APA review of the census calculations. 112 S. Ct. at 2773-76.

The analogous challenge here would be to the President's statutory and constitutional role in deciding

whether to enter into trade negotiations, to sign a particular trade agreement, or to submit such an agreement to Congress for approval. Under *Franklin*, these presidential decisions are not subject to judicial review under the APA. That application of *Franklin* is neither new nor controversial.

Similarly, to the extent that *Franklin* stands for the proposition that the APA provides no basis for obtaining substantive review of advice given by agencies to the President, it hardly revolutionizes the legal landscape. More than forty years ago, this Court held in *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corporation*, 333 U.S. 103 (1948), that a federal statute authorizing judicial review of agency orders did not permit judicial review in those situations in which the President had unreviewable discretion to make the final determination. As such, what amounted to no more than the agency's recommendations to the President could not be challenged as a means to set aside the President's ultimate determination.

Although *Franklin* itself does not revolutionize APA review, it has been applied inconsistently by the lower courts to challenges to agencies' violations of statutory procedures imposed on them (not the President) where the President has the ultimate decisional authority. Thus, the courts of appeals are divided on the question of whether the President's base closing decisions may be challenged because of procedural irregularities in the agency proceedings leading to agency recommendations on which the President relied in making his decisions. The courts of appeals have uniformly held that the courts may not embark on substantive review of the President's decision to approve or disapprove the base closing recommendations made by the Defense Base Closure and Realignment Commission, nor may they review the merits of the base closing recommendations made by the Commission or by the Secretary of Defense. However, they are divided on the issue of whether Congress intended to preclude judicial review of noncompliance by the Secretary or the Commission with certain procedural obligations

imposed by statute, namely that (1) the Secretary failed to transmit to the Commission and the General Accounting Office all the information used by him in making his recommendation, and (2) the Commission held some private meetings that should have been conducted as public hearings under the Act. In *Cohen v. Rice*, 992 F.2d 376 (1993), the First Circuit held that APA review was unavailable under *Franklin*, while in *Specter v. Garrett*, 995 F.2d 404 (1993), the Third Circuit held that review was available. The government has asked this Court to review the *Specter* decision to resolve the conflict. *Dalton v. Specter*, No. 93-289 (filed August 23, 1993).

The two cases considering whether judicial review of legislative-type EIS cases is available under *Franklin* have also reached conflicting results. Thus, in direct conflict with the decision below, *Colorado Environmental Coalition v. Lujan*, 803 F. Supp. 364, 370 (D. Colo. 1992), held that an agency's refusal to prepare a supplemental EIS on its wilderness designations is judicially reviewable, even though the President is charged by statute with submitting wilderness designations to Congress, which may differ from the agency's proposal, and Congress must pass a law affording such protection. Even the court of appeals' judges in this case could not agree on the effect of their ruling on future NEPA challenges. Thus, while the majority suggested that some legislative EIS cases could still be reviewed in the courts, App. 7a-8a, the concurrence suggested that *Franklin* marked the death knell for judicial review of all legislative EIS challenges. App.9a-10a.

Even if this Court hears *Specter*, it should also review this case because there is a critical distinction between this case and the base closing challenges. In the base closing cases, the plaintiffs are seeking to set aside the *President's* base closing decisions based on the *agencies'* violations of procedural requirements in making their recommendations to the President. In contrast, petitioners are not asking the courts to review, set aside, or otherwise issue any relief with

respect to the President's decisions to negotiate the NAFTA, sign it, or submit it to Congress for approval. Rather, petitioners seek a declaration that a federal agency (the Office) has an obligation to comply with a statute that imposes independent obligations on the agency to prepare an EIS. Indeed, in the only other NEPA case addressing the effect of *Franklin* on judicial review of legislative-type EIS cases, *Colorado Environmental Coalition*, 803 F. Supp. at 370, the court highlighted the fact that the plaintiffs sought no relief against the President.

This case is analogous to a claim under the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2, that a closed meeting dealing with NAFTA should be open, or to a lawsuit seeking access under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to documents about NAFTA. Judicial review in those cases would not be precluded simply because the President has the authority to decide whether to enter into NAFTA or to seek congressional approval of it. This is because the Office's obligations under FACA and FOIA, like NEPA, are independent of the President's role in entering into or submitting NAFTA to Congress, in contrast to the challenged action of the Secretary of Commerce in *Franklin*, which was part and parcel of the President's decision regarding the census data. Indeed, if the decision below correctly applies *Franklin*, then this Court would never have had to reach the difficult statutory and constitutional issues in *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989), where the plaintiffs sought to compel the Department of Justice to comply with certain procedures in obtaining advice on judicial nominees. No one suggested that the President's constitutional role in nominating federal judges eliminated judicial review of the agency's compliance with independent statutory obligations in utilizing a federal advisory, committee, yet that is the logic of the court of appeals

application of *Franklin*. [5]

Thus, if the census statute had required the Secretary of Commerce to prepare a public census report as part of his advice to the President, and the Secretary failed to do so, surely the courts could, under the APA, review a challenge to the Secretary's violation of such a statute. Similarly, a member of the public who wanted to attend a hearing of the base closing commission could bring a lawsuit under the APA challenging the announced plan to close a hearing required to be open under the base closing statute. The difference between these hypotheticals and the challenges in *Franklin* and *Specter* is that the litigants would be seeking to enforce an independent obligation imposed by statute on the agency rather than trying to set aside a presidential action based on the agency's procedural irregularity. As Justice Scalia emphasized in his concurrence in *Franklin*, although the courts may rarely issue relief that runs directly against the President, they may still review agency actions implementing presidential decisions, *Franklin*, 112 S. Ct. at 2790 (Scalia, J., concurring in part, and concurring in judgment); *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and there is no reason why an agency's compliance with its independent statutory obligations should stand on a different footing.

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[5]While the FOIA contains its own judicial review provision and hence is not subject to the APA's "final agency action" requirement, it is inconceivable that Congress intended to make FOIA claims connected to presidential actions reviewable, but not comparable NEPA or FACA claims. Indeed, the courts have rejected the related contention that agencies are exempt from FOIA when they prepare records at the President's direction, or to assist the President in carrying out his functions. *Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971).

Nonetheless, while the result below differs from that reached in *Specter*, there may be reasons (not relied on by the Third Circuit) for finding that Congress intended to preclude challenges to the President's base closing decisions that do not apply here. Thus, even if this Court hears *Specter* and decides that procedural irregularities in the agencies' proceedings cannot be the basis for setting aside the President's decisions, review of agencies' violations of their independent statutory obligations should still be available, as long as the relief sought is directed solely to obtaining compliance with those obligations, and not to upsetting the President's decision. Since this case seeks neither to set aside the President's decision to sign NAFTA, nor to prevent the President from transmitting NAFTA to Congress, *Franklin* does not preclude challenges to the Office's refusal to prepare an EIS, simply because that refusal is connected to a matter on which the President has final decisional authority. For that reason, this Court should grant the writ and hear arguments in this case at the same time as *Specter*, if it also decides to hear that case.

C. This Case Warrants Review Because the Court of Appeals Misapplied *Franklin*.

The court of appeals erroneously concluded that "the 'final agency action' challenged in this case is the submission of NAFTA to Congress by the President." App. 8a; *see also* at App. 3a ("we conclude that NAFTA is not 'final agency action'"). This characterization of the challenged action is wrong because petitioners are not challenging the NAFTA itself or the President's decision to submit it to Congress. Rather, they are challenging the Office's refusal to include an EIS in its recommendation that the United States enter into the NAFTA, which is analogous to the court's identification of the challenged action in the only other NEPA application of *Franklin*. *Colorado Environmental Coalition*, 803 F. Supp. at 370 (challenged action is "the Secretary's decision not to prepare a [Supplemental]EIS pursuant to NEPA").

Since the APA provides a right of action to persons "aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, and since petitioners are claiming a right under NEPA, the challenged action must be defined by reference to the agencies' NEPA obligations.

Because the court of appeals mischaracterized the challenged action, it also erred in its evaluation of *Franklin*'s core question: "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." 112 S. Ct. at 2773. The Office has unquestionably completed its decisionmaking process since it has made its final recommendation on a final NAFTA without an EIS; all subsequent actions with respect to NAFTA are in the hands of the President and Congress. The Office's failure to include an EIS in that recommendation, which *Kleppe* establishes is when NEPA compliance is both due and reviewable, is final action challengeable under the APA. 5 U.S.C. § 706(1); *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971) (agency's failure to initiate a proceeding is final agency action); *Environmental Defense Fund v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970) (same). The Office's recommendation, as opposed to NAFTA itself, does not "present[] a moving target," nor is it "still subject to correction" by the President. *Franklin*, 112 S. Ct. at 2774, 2775.

With regard to the second prong of the *Franklin* test, the Office's failure to prepare such an EIS "directly affect[s] the parties" because it deprives them of statutorily mandated information on an action that will cause them harm if it is implemented. Indeed, the majority acknowledged that "the argument that the absence of an EIS 'directly affects' Public Citizen's ability to lobby Congress and disseminate information seems persuasive on its face." App. 7a. Nonetheless, it rejected this argument based on a D.C. Circuit decision on standing, which did not construe the APA's "final agency action" requirement, but simply held

that the plaintiffs lacked standing because they had not identified a specific agency action (like NAFTA) that triggered NEPA's requirements. *See Foundation on Economic Trends v. Lyng*, 943 F.2d 79 (D.C. Cir. 1991). On that basis, the majority truncated its analysis of petitioners' theory of the availability of APA review, without any further discussion. App. 8a.

Finally, and perhaps most significantly, the court of appeals' application of *Franklin* runs counter to the well-established presumption of reviewability of agencies' violations of statutory mandates, which is embodied in the APA's judicial review provisions. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967); *see also American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902). Prior to the APA, litigants, like the petitioners, could obtain agency compliance with nondiscretionary statutory duties by seeking a writ of mandamus. *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 545 (1937); *Work v. U.S. ex rel. Rives*, 267 U.S. 175, 177 (1925); *U.S. ex rel. Kansas City Southern Railway Co. v. Interstate Commerce Commission*, 252 U.S. 178, 187 (1920). Since an agency's obligation to prepare an EIS is such a nondiscretionary duty, petitioners could have obtained judicial review of the Office's refusal to prepare an EIS by filing a mandamus action. *Calvert Cliffs*, *supra*; 28 U.S.C. § 1361. Although the APA sought to codify existing practice and eliminate technical barriers to obtaining judicial review, the court of appeals' construction of the APA's "final agency action" requirement to preclude judicial review of this case resurrects the type of technical pleading obstacles that the APA sought to render obsolete. Accordingly, the decision below is wholly insupportable under the APA.

CONCLUSION

For all these reasons, the petition for a writ of certiorari should be granted, and the case should be set for any argument held in *Dalton v. Specter*, No. 93-289.

Respectfully submitted,

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued August 24, 1993 Decided September 24, 1993

No. 93–5212

PUBLIC CITIZEN; FRIENDS OF THE EARTH, INC.; SIERRA CLUB, APPELLEES

v.

UNITED STATES TRADE REPRESENTATIVE, APPELLANT

Appeal from the United States District Court
for the District of Columbia
(92cv02102)

Drew S. Days, III, Solicitor General, argued the cause for appellants. On the briefs were *Ira S. Shapiro,* General Counsel, United States Trade Representative, *Peter R. Steenland, Jr.,* Acting Assistant Attorney General, and *Bradley M. Campbell,* Attorney, U. S. Department of Justice.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Patti A. Goldman argued the cause for appellees. With her on the brief were *Alan B. Morrison* and *Paul R. Q. Wolfson*. *Paul R. Q. Wolfson* also entered an appearance.

Janice A. Kaye filed the brief for Bipartisan Congressional *amici curiae* Senators Donald W. Riegle, Jr., et al.

Kathleen Rogers, *F. Kaid Benfield*, *S. Jacob Scherr*, *Robert F. Housman* and *Paul M. Orbuch* filed the brief for *amici curiae* Natural Resources Defense Council, et al.

Roderick E. Walston, Chief Assistant Attorney General, *Theodora P. Berger*, Assistant Attorney General, and *Craig C. Thompson*, Supervising Deputy Attorney General, State of California Department of Justice, filed the brief for *amici curiae* State of California, ex rel., et al.

Daniel J. Popeo and *Paul D. Kamenar* filed the brief *amici curiae* The Washington Legal Foundation, et al.

Johanna F. Chanin filed the brief for *amicus curiae* The Border Trade Alliance.

Joel D. Joseph filed the brief for *amicus curiae* Made in the USA, Inc.

John J. Rademacher, General Counsel, American Farm Bureau Federation, filed the brief for *amicus curiae* American Farm Bureau Federation.

Renea Hicks, State Solicitor of Texas, filed the brief for *amici curiae* State of Texas, ex rel., et al.

William E. Mooz, Jr., Attorney, filed the brief for The Amici States.

John J. Kim, *Amy F. Robertson*, *Louis R. Cohen*, *C. Boyden Gray* and *Stuart P. Green* filed the brief for *amici curiae* American Automobile Manufacturers Association, et al.

Thomas E. Patton entered an appearance for *amicus curiae* New York State Bar Association.

Before: MIKVA, *Chief Judge*, WALD and RANDOLPH, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* MIKVA.

Concurring opinion filed by *Circuit Judge* RANDOLPH.

MIKVA, *Chief Judge:*

Appellees Public Citizen, Friends of the Earth, Inc., and the Sierra Club (collectively "Public Citizen") sued the Office of the United States Trade Representative, claiming that an environmental impact statement was required for the North American Free Trade Agreement ("NAFTA"). The district court granted Public Citizen's motion for summary judgment and ordered that an impact statement be prepared "forthwith." In its appeal of that ruling, the government contends that the Trade Representative's preparation of NAFTA without an impact statement is not "final agency action" under the Administrative Procedure Act ("APA") and therefore is not reviewable by this court. Because we conclude that NAFTA is not "final agency action" under the APA, we reverse the decision of the district court and express no view on the government's other contentions.

I. BACKGROUND

In 1990, the United States, Mexico, and Canada initiated negotiations on the North American Free Trade Agreement. NAFTA creates a "free trade zone" encompassing the three countries by eliminating or reducing tariffs and "non-tariff" barriers to trade on thousands of items of commerce. After two years of negotiations, the leaders of the three countries signed the agreement on December 17, 1992. NAFTA has not yet been transmitted to Congress. If approved by Congress, NAFTA is scheduled to take effect on January 1, 1994.

Negotiations on behalf of the United States were conducted primarily by the Office of the United States Trade Representative ("OTR"). OTR, located "within the Executive Office of the President," 19 U.S.C. § 2171(a) ("Trade Act of 1974" or "Trade Acts"), is the United States' chief negotiator for trade matters. OTR "report[s] directly to the President and the Congress, and [is] responsible to the President and the Congress for the administration of trade agreements . . ." *Id.* § (c)(1)(B).

Under the Trade Acts and congressional rules, NAFTA is entitled to "fast-track" enactment procedures which provide that Congress must vote on the agreement, without amendment, within ninety legislative days after transmittal by the President. The current version of NAFTA, once submitted, will therefore be identical to the version on which Congress will vote. President Clinton has indicated, however, that he will not submit NAFTA to Congress until negotiations have been completed on several side agreements regarding, among other things, compliance with environmental laws.

Public Citizen first sought to compel OTR to prepare an environmental impact statement ("EIS") for NAFTA in a suit filed on August 1, 1991. *Public Citizen v. Office of the United States Trade Representative*, 782 F. Supp. 139 (D.D.C.), *aff'd on other grounds, Public Citizen v. Office of the United States Trade Representative*, 970 F.2d 916 (D.C. Cir. 1992) (*Public Citizen I*). The district court dismissed Public Citizen's claim for lack of standing. This court affirmed but did not reach the standing issue. *Public Citizen I*, 970 F.2d at 916. Instead, we ruled that because NAFTA was still in the negotiating stages, there was no final action upon which to base jurisdiction under the APA. *Id.* Public Citizen's current challenge is essentially identical, except that the President has now signed and released a final draft of NAFTA. The district court granted Public Citizen's motion for summary judgment and ordered OTR to prepare an EIS "forthwith." *Public Citizen v. United States Trade Representative*, 822 F. Supp. 21 (D.D.C. 1993). The government appeals.

II. Discussion

The National Environmental Policy Act ("NEPA") requires federal agencies to include an EIS "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment...." 42 U.S.C. § 4332(2)(C). In drafting NEPA, however, Congress did not create a private right of action. Accordingly, Public Citizen must rest its claim for judicial review on the Administrative Procedure Act. Section 702 of

the APA confers an action for injunctive relief on persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702; *see Public Citizen I*, 970 F.2d at 918. Section 704, however, allows review only of "*final* agency action." 5 U.S.C. § 704 (emphasis added); *see Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 882 (1990). The central question in this appeal then is whether Public Citizen has identified some agency action that is final upon which to base APA review.

In support of its argument that NAFTA does not constitute "final agency action" within the meaning of the APA, the government relies heavily on *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992). *Franklin* involved a challenge to the method used by the Secretary of Commerce to calculate the 1990 census. The Secretary acted pursuant to a reapportionment statute requiring that she report the "tabulation of total population by States ... to the President." 13 U.S.C. § 141(b). After receiving the Secretary's report, the President must transmit to Congress the number of Representatives to which each state is entitled under the method of equal proportions. 2 U.S.C. § 2(a)(2). The Supreme Court held that APA review was unavailable because the final action under the reapportionment statute (transmittal of the apportionment to Congress) was that of the President, and the President is not an agency. *Franklin*, 112 S. Ct. at 2773; *see Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991) (the President is not an "agency" within the meaning of the APA).

To determine whether an agency action is final, "[t]he core question is whether the agency has completed its decisionmaking process, *and* whether the result of that process is one that will directly affect the parties." *Franklin*, 112 S. Ct. at 2773 (emphasis added). The *Franklin* Court found that although the Secretary had completed her decisionmaking process, the action that would directly affect the plaintiffs was the President's calculation and transmittal of the apportionment to Congress, not the Secretary's report to the President. *Id.*

This logic applies with equal force to NAFTA. Even though the OTR has completed negotiations on NAFTA, the agreement will have no effect on Public Citizen's members unless and until the President submits it to Congress. Like the reapportionment statute in *Franklin*, the Trade Acts involve the President at the final stage of the process by providing for him to submit to Congress the final legal text of the agreement, a draft of the implementing legislation, and supporting information. 19 U.S.C. § 2903(a)(1)(B). The President is not obligated to submit any agreement to Congress, and until he does there is no final action. If and when the agreement is submitted to Congress, it will be the result of action by the President, action clearly not reviewable under the APA.

The district court attempts to distinguish *Franklin* by noting that unlike the census report (which the President was authorized to amend before submitting to Congress), NAFTA is no longer a "moving target" because the "final product . . . will not be changed before submission to Congress." 822 F. Supp. at 26. The district court goes on to say that NAFTA "shall" be submitted to Congress. *Id.* This distinction is unpersuasive. NAFTA is just as much a "moving target" as the census report in *Franklin* because in both cases the President has statutory discretion to exercise supervisory power over the agency's action. It is completely within the President's discretion, for example, to renegotiate portions of NAFTA before submitting it to Congress or to refuse to submit the agreement at all. In fact, President Clinton has conditioned the submission of NAFTA on the successful negotiation of side agreements on the environment, labor, and import surges. The President's position that the version of NAFTA negotiated by the OTR is the one that he "will" submit to Congress is irrelevant under *Franklin*. Indeed, in *Franklin* the President relied on the census report without making any changes, yet this did not affect the Court's analysis of whether the "final action" under the reapportionment statute was that of the President.

Public Citizen seeks to distinguish *Franklin* by arguing that the EIS requirement is an independent statutory obli-

gation for the OTR and thus the agency's failure to prepare an EIS is reviewable final agency action. But the preparation of the census report in *Franklin* was also an "independent statutory obligation" for the Secretary of Commerce. The Court held nonetheless that because the report would have no effect on the plaintiffs without the President's subsequent involvement, the agency's action would not have the "direct effect" necessary for "final agency actions." Furthermore, although the argument that the absence of an EIS "directly affects" Public Citizen's ability to lobby Congress and disseminate information seems persuasive on its face, this court has stated that an agency's failure to prepare an EIS, by itself, is not sufficient to trigger APA review in the absence of identifiable substantive agency action putting the parties at risk. *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 85 (D.C. Cir. 1991).

Finally, Public Citizen argues that applying *Franklin* in this case would effectively nullify NEPA's EIS requirement because often "some other step must be taken before" otherwise final agency actions will result in environmental harm. Public Citizen Br. at 43. In support of this position, it catalogs a number of cases in which courts have reviewed NEPA challenges to agency actions that require the involvement of some other governmental or private entity before becoming final. Public Citizen Br. at 40–44. Although we acknowledge the stringency of *Franklin*'s "direct effect" requirement, we disagree that it represents the death knell of the legislative EIS. *Franklin* is limited to those cases in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties. Moreover, *Franklin* notes explicitly the importance of the President's role in the "integrity of the process" at issue. *Franklin*, 112 S. Ct. at 2775. Congress involved the President and the Secretary of Commerce in the reapportionment process to avoid stalemates resulting from congressional battles over the method for calculating reapportionment. *Id.* at 2771. Similarly, the requirement that the President, and not OTR, initiate trade negotiations and submit trade agreements and their implementing legislation to Congress indicates that Congress

deemed the President's involvement essential to the integrity of international trade negotiations. When the President's role is not essential to the integrity of the process, however, APA review of otherwise final agency actions may well be available.

The government advances many other arguments opposing the preparation of an EIS, including weighty constitutional positions on the separation of powers and Public Citizen's lack of standing, as well as the inapplicability of NEPA to agreements executed pursuant to the Trade Acts in general, and NAFTA in particular. It also suggests that the judicial branch should avoid any conflict with the President's power by exercising the "equitable discretion" given it by § 702 of the APA. We need not and do not consider such arguments in light of the clear applicability of the *Franklin* precedent.

The ultimate destiny of NAFTA has yet to be determined. Recently negotiated side agreements may well change the dimensions of the conflict that Public Citizen sought to have resolved by the courts. More importantly, the political debate over NAFTA in Congress has yet to play out. Whatever the ultimate result, however, NAFTA's fate now rests in the hands of the political branches. The judiciary has no role to play.

In sum, under the reasoning and language of *Franklin v. Massachusetts*, the "final agency action" challenged in this case is the submission of NAFTA to Congress by the President. Because the Trade Acts vest in the President the discretion to renegotiate NAFTA before submitting it to Congress or to refuse to submit it at all, his action, and not that of the OTR, will directly affect Public Citizen's members. The President's actions are not "agency action" and thus cannot be reviewed under the APA. The district court's grant of summary judgment in favor of Public Citizen is, therefore,

Reversed.

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RANDOLPH, *Circuit Judge, concurring:* I agree with my colleagues that the injunction against the United States Trade Representative must be set aside. The National Environmental Policy Act requires "all agencies of the Federal Government" to include an impact statement in "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment...." 42 U.S.C. § 4332(2)(C). Private parties may sue to redress alleged violations of this provision only after there has been "final agency action" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 704. *Public Citizen v. Office of the U.S. Trade Representative*, 970 F.2d 916, 918 (D.C. Cir. 1992), citing *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 882 (1990). The majority holds that with respect to the North American Free Trade Agreement, there has been no "final" action because the President has not even transmitted NAFTA to Congress for its approval; and that if and when the President does submit the agreement and its implementing legislation, this would not qualify because, as *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992), decided, the President is not an "agency."

I do not quarrel with either one of these rationales. But I get a bit concerned when the opinion announces that it is too early to toll the bell for judicial review in a "legislative EIS" case and then starts trying to limit *Franklin* (maj. op. at 7–8). The idea behind this is that proposing legislation to Congress can constitute "final ... action," and that when an "agency" rather than the President does the proposing, § 704 of the APA will be satisfied (maj. op. at 8). I am not so sure. *Franklin* held not only that the President is outside the APA's definition of "agency," but also that "action" cannot be considered "final" under the APA unless it "will directly affect the parties." 112 S. Ct. at 2773. When the alleged "action" consists of a *proposal* for legislation, how can this condition for judicial review be satisfied? In *Franklin*, the President's submission to Congress directly affected the parties because, under the "automatic reapportionment statute,"

congressional action was not required. 112 S. Ct. at 2771. In general, however, it is difficult to see how the act of proposing legislation could generate direct effects on parties, or anyone else for that matter. The head of an independent agency, a member of the President's Cabinet, or the President himself may send a letter to the Speaker of the House and the President of the Senate transmitting a draft of proposed legislation. Such "executive communications" are commonplace. *See* How Our Laws Are Made, H.R. Doc. No. 139, 101st Cong., 2d Sess. 4 (1989). Yet only a Member of Congress may introduce a bill embodying the proposal, and even then no one will be affected, directly or otherwise, unless and until Congress passes the bill and the President signs it into law. If one takes *Franklin* at its word, a legislative proposal's lack of any direct effects would seem to mean that there can be no final action sufficient to permit judicial review under the APA. Of course, there is a big difference between saying that APA review is unavailable and saying that officials do not have to comply with NEPA when they suggest legislation. If Congress believed an agency had not lived up to its obligation to prepare an impact statement, it could always refuse to consider the agency's proposal. Or, if Congress wanted to evaluate environmental impacts before putting the measure to a vote, congressional committees could hold hearings on the subject. This is how a large proportion of legislative proposals already must be treated. NEPA's impact statement requirement applies only to federal agencies. Members of Congress, who alone introduce bills and offer amendments, are not covered. Neither are private individuals, corporations, labor unions, citizen groups or other organizations, all of which frequently avail themselves of their First Amendment right to petition the government.

I am therefore not prepared to say whether in NEPA cases, the act of proposing legislation constitutes final action under § 704 of the APA, as *Franklin* has interpreted that provision. This is a troublesome question, bound to arise in future cases, and we should not stake out a position on it here. The nub of the problem is that judicial review under the APA demands "final agency action" whereas the duty to prepare an impact statement arises earlier. The main objective of an impact statement is to ensure that the decisionmak-

er considers environmental effects prior to taking action. This is why in *Kleppe v. Sierra Club*, 427 U.S. 390, 406 n.15 (1976), the Court—without mentioning § 704 of the APA—identified the "time at which a court enters the process" to be "when the report or recommendation on the proposal is made, and someone protests either the absence or the adequacy of the final impact statement." *Franklin*'s direct-effects-on-the-parties test, as applied to NEPA suits, may have to be reconciled with the portion of *Kleppe v. Sierra Club* just quoted. But there is no need to make the attempt in this case. It is enough to hold that regardless of whether the President's submission of NAFTA to Congress would be final action, there is no "final" action that can be attributed to an "agency."

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, *et al.*,

Plaintiffs,

v. Civil Action
No. 92-2102 (CRR)

OFFICE OF THE UNITED STATES
TRADE REPRESENTATIVE

Defendant.

Filed
JUN 30 1993
NANCY M. MAYER-WHITTINGTON

OPINION OF CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

For Plaintiffs: Patti Goldman, with Alan B. Morrison and Paul R.Q. Wolfson of the Public Citizen Litigation Group.

For Defendant: Bradley M. Campbell, with Samuel C. Alexander of the United States Department of Justice, Environmental and Natural Resources Division, and Roger B. Clegg, Acting Assistant Attorney General and Benedict S. Cohen, Acting Deputy Assistant Attorney General.

I. INTRODUCTION

Before the Court are the parties' cross Motions for Summary Judgment in the above-captioned case. In their Complaint, the Plaintiffs allege that the Defendant has failed to comply with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, in the negotiation and conclusion of the North American Free Trade Agreement ("NAFTA"). More specifically, the Plaintiffs challenge the

Defendant's failure to prepare an environmental impact statement ("EIS") on the NAFTA and request that the Court order the Defendant to produce an EIS on the NAFTA before the President submits it to Congress. The NEPA requires that all federal agencies prepare an EIS for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

The Court held oral argument on the motions on May 25, 1993. After careful consideration of the papers filed by the parties, the arguments of counsel at the hearing, the underlying law, and the entire record in this action, the Court shall grant the Plaintiffs' Motion for Summary Judgment.

II. BACKGROUND

In 1991, the United States began trilateral negotiations with Canada and Mexico with the goal of establishing a North American free trade zone. *See* 56 Fed. Reg. 32,454-55 (July 16, 1991). These negotiations resulted in the NAFTA, a comprehensive document affecting every aspect of trade among the three countries. The NAFTA was signed by the trade representatives of the United States, Mexico and Canada on October 7, 1992[1]

The NAFTA is subject to the provisions of the Trade Act of 1974, as amended. *See* 19 U.S.C. § 2101 *et seq.*, ("the Trade Acts"). The Trade Acts provide that the Defendant United States Office of the Trade Representative ("OTR") shall serve as the President's chief negotiator in trade matters. *Id.* § 2171(c). The NAFTA will be submitted

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[1]The NAFTA addresses, *inter alia*, barriers to trade, intellectual property rights, and trade in goods. It also provides an exhaustive tariff schedule to govern trade between the three countries.

to Congress under the "fast track" approval process.[2] *See* 19 U.S.C. §§ 2191-2194, 2902-2903. Under the fast track process, the President submits the NAFTA to Congress along with implementing legislation and an explanation of the changes in the current law. 19 U.S.C. § 2903(a)(1)(B). The NAFTA must be approved by both Houses of Congress before it can become effective, and such approval occurs when the NAFTA's implementing legislation has been enacted by both the Senate and the House of Representatives. 19 U.S.C. § 2903(a)(1). Under the fast track process, once the NAFTA has been submitted to Congress, Congress has only 60 legislative days to approve or reject the agreement, *id.* § 2191(c) and (e); legislative debate is limited to 20 hours in each House, *id.* § 2191(f) and (g); and Congress may not change the implementing legislation or the Agreement. *Id.* § 2191(d). The President has no obligation to submit the NAFTA to Congress for ratification; however, he is expected to do so some time this fall. *See* John Dillin, *Kantor Says NAFTA Will Bring More Jobs*, Christian Science Monitor, June 23, 1993, at 2 (United States Trade Representative Mickey Kantor says that NAFTA should be ready for Congress in September.)

As noted earlier, the NEPA requires an EIS for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The Plaintiffs are three nonprofit groups that have taken an active interest in the environment: Public Citizen, the Sierra Club, and the Friends of the Earth. They contend that the Defendant United States Trade Representative and the NAFTA are subject to the NEPA and

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[2]The fast track procedures are not statutory requirements but have been adopted as an exercise of the rule making power of the House of Representatives and the Senate. *See* 19 U.S.C. § 2191(a)(1).

bring this action for declaratory relief to compel the Defendant to prepare an EIS on the NAFTA before it is submitted to Congress. The Plaintiffs allege that this Court has jurisdiction in this suit under the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq.*, which provides for judicial review of a final agency action by a party adversely affected or aggrieved by agency action within the meaning of a relevant statute, here the NEPA.

As the Defendant admits no EIS was prepared on the NAFTA, the question before the Court is whether the NEPA and the APA provide relief to the Plaintiffs under these circumstances. In other words, the issue before the Court is whether the NEPA and the APA properly apply to the NAFTA and the OTR's action in negotiating, drafting and ultimately approving the NAFTA on behalf of the United States. As to these issues, the Defendant claims that: 1) there is no jurisdiction over this suit under the APA; 2) the Plaintiffs have no standing in this action; and 3) the NEPA does not apply to the NAFTA. However, the Court concludes that the plain language and policies of the APA and the NEPA apply to the NAFTA and the OTR. Furthermore, the Court finds that there is jurisdiction here under the APA and that the Plaintiffs' allegations of environmental harm are sufficient for purposes of standing under the NEPA. Finally, the Court determines that the Defendant has ignored the clear language and the legislative mandate of the NEPA in failing to prepare an EIS of the NAFTA, and, therefore, the Court shall grant summary judgment for the Plaintiffs.

III. THIS COURT HAS JURISDICTION OVER THIS ACTION UNDER THE APA BECAUSE THE DEFENDANT HAS TAKEN FINAL AGENCY ACTION IN ITS PREPARATION AND FINALIZATION OF THE NAFTA.

As a threshold matter, the Court concludes that it has subject matter jurisdiction under the APA for the Plaintiffs'

claims under the NEPA.

The same Plaintiffs filed an earlier challenge to the NAFTA in August 1991. At that time, the negotiations for the NAFTA had not yet been concluded and no agreement had been finalized. That action was dismissed by the district court. *Public Citizen v. Office of United States Trade Representative*, 782 F. Supp. 139 (D.D.C. 1992) (June Green, J.). The Court of Appeals affirmed the dismissal of that action, holding that there was no jurisdiction under the APA because there had not been any final agency action under section 704 of the APA. *Public Citizen v. Office of United States Trade Representative*, 970 F.2d 916 (D.C. Cir. 1992). The Circuit noted that there was no event triggering the agency's obligation to prepare an EIS because no final NAFTA agreement had been reached, as only incomplete drafts had been prepared. *Id.* at 919. Under these circumstances, our Court of Appeals believed that a suit challenging the NAFTA was premature. *Id.* The Plaintiffs now properly assert that the OTR has taken final action as to the NAFTA and there is jurisdiction under the APA in the instant action.

The Court begins, as our Court of Appeals did in the prior case, in analyzing the question of final agency action by examining the "NEPA itself, for it specifically identifies the time when an agency's action is sufficiently concrete to trigger the EIS requirement." *Id.* at 918. Our Court of Appeals explicitly stated that in order to challenge the NAFTA, the "[P]laintiffs must point to a specific proposal for legislation or other action 'at least arguably triggering the agency's obligation to prepare an impact statement.'" *Id.* at 918-19, *quoting Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 85 (D.C. Cir. 1991). In rejecting the Plaintiffs' earlier claim, our Court of Appeals explicitly noted that no final agreement had yet been produced in NAFTA negotiations and that it was unclear whether the negotiations would ever produce a final agreement. *Id.*

However, it is undisputed that the NAFTA agreement has now been finalized and signed by the United States, Canada, and Mexico. It is also undisputed that the NAFTA signed by the three countries is the same agreement that will be sent to Congress. Furthermore, under the fast track procedure, the agreement itself cannot be changed after it has been sent to the Congress for ratification. 19 U.S.C. § 2191(d).[3] Therefore, the Court concludes that the NAFTA agreement constitutes final agency action under the APA for purposes of this lawsuit.

A. THIS COURT HAS APA JURISDICTION BECAUSE THE DEFENDANT OFFICE OF TRADE REPRESENTATIVE IS AN AGENCY UNDER THE APA AND BECAUSE THE DEFENDANT HAS HAD SIGNIFICANT INVOLVEMENT IN THE PREPARATION, NEGOTIATION, AND DRAFTING OF THE NAFTA.

However, this does not end the Court's inquiry under the APA as the Defendant raises a related argument regarding jurisdiction that must be addressed as a threshold matter. The Defendant contends that there is no APA jurisdiction in this case because the President, and not the Defendant, is responsible for any final agency action on the NAFTA and there is no APA jurisdiction to review actions by the President. Defendant's Memorandum in Support of its Motion, at 15; *see Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991) (no APA jurisdiction to challenge the actions of the President). More specifically, the Defendant claims that APA jurisdiction is improper here because: 1) the NAFTA is actually a result of the President's efforts, and not

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[3] Various side agreements are being negotiated by the three countries on topics related to the NAFTA. However, the Defendant does not claim that the NAFTA itself is not a final agreement by virtue of the negotiation of these side agreements.

that of the OTR for purposes of the APA and the NEPA; 2) the final agency action with regard to the NAFTA is its submission to Congress by the President and not simply its negotiation and the production of a final agreement; and 3) the President has no obligation to submit the NAFTA to Congress. However, the Court is not persuaded that such arguments preclude APA jurisdiction in this case and believes that the Defendant's arguments misread the language of the applicable statutes and the case law. The Court shall address each of these arguments in turn.

First, the Court concludes that the NAFTA is, in substantial part, a result of the work of the Defendant OTR and therefore reviewable under the APA and the NEPA. The Defendant Office of the United States Trade Representative is charged by statute with the responsibility for conducting international trade negotiations, developing and coordinating United States trade policy and imposing any retaliatory trade sanctions on other countries. *See* 19 U.S.C. §§ 2171, 2411-2417. It is undisputed that the Defendant OTR has, in substantial part, negotiated and drafted the NAFTA.

The Court again looks to the language and case law under the NEPA in order to understand whether the Defendant's actions regarding the NAFTA constitute final agency action under the APA. Under the NEPA, a federal agency is still required to prepare an EIS even if a project or proposal is not exclusively a federal agency endeavor. *See Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425 (C.D. Cal. 1985); *cf. Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985) (where U.S. Corps of Engineers granted a permit for part of a construction project, an EIS was required on the entire project). Furthermore, the Council for Environmental Quality ("CEQ"), which was established by the NEPA, has issued regulations pertaining to the NEPA and its interpretation of the NEPA is entitled to substantial deference. *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (citations omitted); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355 (1989). The CEQ's regulations

specifically provide that, for purposes of the NEPA, legislation:

> includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a federal agency . . . . The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. . . . Proposals for legislation include requests for ratification of treaties.

40 C.F.R. § 1508.17 (1992); *see Andrus*, 442 U.S. at 357. The Court also notes that the CEQ regulations provide that major federal actions under NEPA include projects and programs entirely or partially conducted by federal agencies. 40 C.F.R. § 1508.18(a) (1992). Therefore, the significant actions taken by the Defendant OTR in negotiating and drafting the NAFTA are sufficient to trigger the EIS under the NEPA.[4]

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[4] The Office of the United States Trade Representative has a separate statutory basis for its authority and has many separate responsibilities aside from assisting and advising the President, *see* 19 U.S.C. § 2171, and thus, the OTR is an agency subject to the APA. *See Soucie v. David*, 448 F.2d 1067 (1971) (a component with substantial independent authority in the exercise of its functions is an agency); *see also Energy Research Foundation v. Defense Nuclear Facilities Safety Bd.*, 917 F.2d 581 (D.C. Cir. 1990).

Furthermore, the Court notes that this finding is supported by the fact that the appointment of the OTR's top officials are subject to the advice and consent of the Senate, thus making them somewhat independent of the executive branch. 19 U.S.C. § 2171(b). In addition, the OTR is an agency under the Freedom of Information Act and the Privacy Act. *See* 15 C.F.R. §§ 2004, 2005 (1993).

Second, the Court concludes that the mere fact that the President submits the NAFTA to Congress does not bar review under the APA in this case. The Defendant principally relies on the Supreme Court's recent decision in *Franklin v. Massachusetts*, 112 S.Ct. 2767 (1992), for its argument that the President's submission of the NAFTA to Congress prevents APA jurisdiction here. In *Franklin*, the Supreme Court held that there was no final agency action, and thus no jurisdiction under the APA, for the Secretary of Commerce's actions regarding the census. Under the automatic reapportionment statute at issue in that case, the Secretary of Commerce supervises the taking of the census, compiles the data and reports that information to the President. After receiving the Secretary's report, the President then has the statutory responsibility for transmitting a statement to Congress showing the results of the census and the number of Representatives to which each state is entitled. *Id.* at 2771. The Court in *Franklin* concluded that there was no APA jurisdiction of the Secretary of Commerce's actions because the President took the final action in reporting the census figures to Congress and such executive action was not reviewable under the APA.

The Defendant analogizes the President's submission of the census to the Congress to his submission of the NAFTA. However, such an analogy is misplaced. In *Franklin*, the Court reasoned that "[t]he core question is whether the agency has completed its decision making process, and whether the result of that process is one that will directly affect the parties." *Id.* at 2773. The Court concluded that no decision making process was completed where the census figure supplied by the Secretary to the President was actually a "moving target, even after the Secretary reports to the President." *Id.* at 2774. The Court noted that, even after the Secretary submits his report to the President, the census information can be amended before being transmitted to Congress, the President could instruct that the census be reformed, and that, in fact, the President

was not required to adhere to the policy decisions reflected in the Secretary's report. *Id.* at 2774-75. Thus, the census report in *Franklin* was "more like a tentative recommendation than a final and binding determination." *Id.* at 2774. On the other hand, the NAFTA is in stark contrast to the census report in *Franklin* because *the NAFTA is a complete and, most importantly, a final product that will not be changed before submission to Congress. The NAFTA that was negotiated and signed by the Trade Representative is the same document that shall be submitted to Congress and which is the subject of this suit.*

Third and finally, the fact that the President is under no obligation to submit the NAFTA to the Congress is not a bar to APA jurisdiction. Once again, a reference to the NEPA demonstrates why the actions by the Defendant here are final for purposes of APA jurisdiction and the preparation of an EIS. As discussed earlier, the NEPA requires that *an EIS must be prepared for legislative proposals. See Izaak Walton League of America v. Marsh*, 655 F.2d 346 (D.C. Cir.), *cert. denied*, 454 U.S. 1092 (1981). The case law is clear that *an EIS must be prepared once such a proposal is completed and that its submission to Congress is not required. Trustees for Alaska v. Hodel*, 806 F.2d 1378 (9th Cir. 1986) (noting that once Congress acts on a proposal, the aggrieved party may lose its right to judicial review). As the NEPA unambiguously requires an EIS on "proposals for legislation," 42 U.S.C. § 4332(2)(C), the Court concludes that an EIS on the NAFTA is required.

IV. THE EXERCISE OF APA JURISDICTION UNDER THE APA IN THIS CASE IS NOT A VIOLATION OF SEPARATION OF POWERS BECAUSE THE NAFTA HAS ALREADY BEEN DRAFTED AND APPROVED BY THE THREE COUNTRIES AND THE PREPARATION OF AN EIS WILL NOT INTERFERE WITH THE PRESIDENT'S AUTHORITY.

The Defendant further argues that an exercise of APA

jurisdiction in this case would violate separation of powers by infringing on the Executive's right and ability to conduct foreign policy. Defendant's Memorandum in Support of its Motion, at 20. However, such an argument is not persuasive in this case.

The Court concludes that the separation of powers doctrine does not bar the Plaintiffs' claims because an exercise of jurisdiction in this case under the APA and the NEPA is not an infringement of the powers of the President. In arguing that the EIS requirement will impede the President's power to conduct foreign policy, the Defendant conveniently ignores the fact that the power to regulate commerce with foreign nations is given to the Congress under the Constitution. *See* Constitution, Art. 1, Sec. 8, cl. 3.

Furthermore, assuming *arguendo* that the EIS requirement here raises a separation of powers question, the circumstances surrounding this lawsuit demonstrate that an application of the NEPA to the NAFTA will not impede the President's power in any meaningful way. The NAFTA is a completed document which has been signed and agreed to by the three heads of state for the United States, Canada, and Mexico. The only remaining step to be taken regarding the NAFTA is a domestic one, specifically, the submission of the NAFTA for approval by the Congress for possible ratification. The EIS requirement is, therefore, a domestic issue, where an agency must inform the relevant decision makers, in this case the Congress, of the environmental consequences of a proposal for legislation. *See* 42 U.S.C. § 4332(2)(C). Given the current posture of the NAFTA, the Court does not believe that the EIS requirement would so infringe on the President's power as to be a violation of the

doctrine of separation of powers.[5]

V. THE PLAINTIFFS HAVE STANDING TO CHALLENGE THE DEFENDANT'S FAILURE TO PREPARE AN EIS FOR NAFTA BECAUSE THE PLAINTIFFS ALLEGE SUFFICIENT AND COGNIZABLE INJURY.

The Plaintiffs claim that they have standing because the NAFTA, by its terms, will result in changes to federal and state law and policy in a variety of health and environmental matters and that these changes will have an environmental impact on them. Furthermore, the Plaintiffs argue that NAFTA will result in environmental changes to certain geographical areas, such as the area on the border between the United States and Mexico. Under these circumstances, the Plaintiffs contend that "the Court can determine whether NAFTA is likely to harm plaintiffs." Plaintiffs' Reply Brief at 9. The Court finds that the Plaintiffs' allegations, and the affidavits submitted in support thereof, establish standing under the NEPA.

It is clearly established law that:

> (t)he procedural and informational thrust of [the] NEPA gives rise to cognizable injury from denial of its explanatory process, so long as there is a reasonable risk that environmental injury may occur.

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[5]The Defendant's argument concerning separation of powers had more force in the prior suit regarding the NAFTA because the Plaintiffs were requesting that an EIS be completed before the conclusion of the NAFTA negotiations. *See Public Citizen v. Office of United States Trade Representative*, 782 F. Supp. 139 (D.D.C. 1992) (June Green, J.). However, such a suit was dismissed on other grounds and thus no infringement of Executive power occurred.

City of Los Angeles v. National Highway Traffic Safety Admin., 912 F.2d 478, 492 (D.C. Cir. 1990).[6] The Court agrees with the Plaintiffs that the NAFTA will create binding obligations on state and federal agencies to conform with its terms. The NAFTA, by its very terms, sets forth criteria that may form a basis for challenging various domestic health and environmental laws. *See e.g.* Plaintiffs' Exhibit A (NAFTA, Chapter 7). Those laws that are found to be contrary to the NAFTA's free trade provisions either cannot be applied or can become the basis of trade sanctions.[7] In addition, by virtue of the Supremacy Clause, a state law that

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[6]In the prior suit brought by the Plaintiffs, the district court dismissed the action, holding that the Plaintiffs did not establish standing under the NEPA. *Public Citizen v. Office of U.S. Trade Representative*, 782 F. Supp. 139, 142 (D.D.C. 1992). More specifically, Judge June Green found that the Plaintiffs failed to establish standing derivatively through its members because it could not show that members' environmental or recreational interests would be harmed by a particular agency action. *Id.* However, as discussed earlier, no final NAFTA agreement had been reached when that suit was pending and thus any allegations of harm were premature. *Public Citizen v. Office of the United States Trade Representative*, 970 F.2d 916, 919 (D.C. Cir. 1992). In addition, our Court of Appeals did not reach the issue of standing in affirming the district court's dismissal. *Id.*

[7]The Plaintiffs set forth numerous health and environmental measures which may be set aside as contrary to the NAFTA, thus leading to injury. These include, *inter alia*, pesticide residue standards, chemical bans, bans on seafood imports based on certain environmental criteria, and pollution controls. *See* Wallach Affidavit.

conflicts with the NAFTA is preempted by the NAFTA. *See id.* (NAFTA, Article 105 (countries must "ensure that all necessary measures are taken" to comply with the NAFTA, including compliance by "state and provincial governments")). Thus, changes in federal and state law to conform with the NAFTA may very likely result in environmental injuries to certain members of the Plaintiff organizations, particularly those in California and Wisconsin. *See* Claybrook Affidavit ¶¶ 6-8; McCloskey Affidavit ¶ 5; Wallach Affidavit ¶¶ 53-57.[8] For example, the NAFTA could serve as a basis to challenge federal and state laws, such as the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 348 (c)(3)(A) & 376(b)(2), as well as California's Proposition 65, Cal. Health & Safety Code §§ 2549.5 *et seq.*, that prohibit certain carcinogens in water and food. *See* Wallach Affidavit ¶¶ 34, 55-56.

Furthermore, the Court notes that the allegations of possible environmental harm as a result of the NAFTA to members of the Plaintiff organizations who live on the United States-Mexico border region are sufficiently concrete

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[8]History demonstrates that the conflict between the NAFTA and other federal and local laws is far from hypothetical: For example, a dispute panel under the General Agreement on Tariffs and Trade, commonly referred to as GATT, has recently ruled that the Marine Mammal Protection Act impermissibly restricts Mexican trade in violation of GATT. *See* Plaintiffs' Exhibit C (GATT Panel Report, *United States - Restrictions on Imports of Tuna*, at 4O-42, 45-47 (1991)). The Marine Mammal Protection Act is an environmental statute that prohibits tuna imports from countries that use fishing methods that kill dolphins in greater numbers than domestic companies are permitted by the statute. 16 U.S.C. § 1371; *see Committee for Humane Legislation, Inc. v. Richardson*, 414 F. Supp. 297 (D.D.C.), *aff'd*, 540 F.2d 1141 (1976).

as to establish standing. *See* Audley Affidavit ¶¶ 6, 13-20, 39-47; Perkins Affidavit ¶ 12. In particular, the Court notes that a limited free trade zone along the United States-Mexican border, known as the Maquiladora program, demonstrates that the Plaintiffs' environmental concerns are not speculative. The Maquiladora program has resulted in grave environmental problems to those people living on either side of the border. *See* Audley Affidavit ¶ 21-26. These problems are so severe that the area has been called a "virtual cesspool and breeding ground for infectious diseases . . . ." Plaintiffs' Exhibit T, (Council on Scientific Affairs, "A Permanent US - Mexico Border Environmental Health Commission," 263 *JAMA* 3319, 3320 (1990)). The Plaintiffs also make claims as to the air quality on behalf of their members in specific metropolitan areas, such as San Diego, California, and El Paso, Texas, and allege that air quality in these cities will suffer as a result of the NAFTA. *See e.g.*, Claybrook Affidavit ¶ 8.

In fact, as part of its work on the NAFTA, the Defendant prepared a *Review of U.S.-Mexico Environmental Issues* ("the Review"), which identifies numerous environmental issues related to the NAFTA. *See* Plaintiffs' Exhibit D. The Review confirms that the NAFTA will have significant environmental effects and acknowledges that NAFTA may worsen the environmental problems already existing in the United States-Mexico border area. *Id.*, (Executive Summary at 3-7).[9] Such allegations of injury are

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[9]The Environmental Review was a general study conducted on the possible ramifications of the NAFTA but the Defendant does not contend that it qualifies as an EIS under the NEPA. It does not qualify as an EIS because it does not analyze the effect of the actual NAFTA, or identify and analyze other alternatives. 42 U.S.C. § 4332(2)(c); *see Natural Resources Defense Council v. Morton*, 337 F. Supp. 165 (D.D.C.) (Richey, J.), *aff'd*, 458 F.2d 827 (D.C. Cir.

sufficient for standing purposes. *See Public Citizen v. National Highway Traffic Safety Admin.*, 848 F.2d 265 (D.C. Cir. 1988); *National Wildlife Federation v. Hodel*, 839 F.2d 694 (D.C. Cir. 1988); *Oregon Environmental Council v. Kunzman*, 817 F.2d 484 (9th Cir. 1987).

The Defendant complains that many of the alleged environmental effects of the NAFTA are too widespread to be confined to a particular geographical location.[10] However, the absence of a geographical nexus does not defeat a claim of standing because that "would mean that the most injurious and widespread government actions could be questioned by nobody." *United States v. SCRAP*, 412 U.S. 669, 687-88 (1973).[11]

1972) (Leventhal, J.).

[10]Such claims include the allowance of pesticides on food imports from Mexico.

[11]In addition, the Plaintiffs allege that certain NAFTA provisions will cause a wide variety of other pervasive and adverse environmental effects. For example, they claim that NAFTA's reduction of trade barriers will cause a reduction in prices for domestic agricultural and meat products, thus creating pressure to intensify domestic production methods which will have a detrimental effect on the environment. *See* Plaintiffs' Exhibit A (NAFTA, Chapter 7); Ritchie Affidavit ¶¶ 4-8. In addition, the Plaintiffs allege that NAFTA's energy incentives for oil and gas exploration will encourage the use of nonrenewable energy resources. *See* Plaintiffs' Exhibit A (NAFTA, Chapter 6); Wallach ¶ 65. Finally, they claim that the NAFTA may have "pollution haven effects" in that domestic companies will move their operations to Mexico to avoid more stringent U.S. environmental laws. *See* Plaintiffs' Exhibit D (Review, Executive Summary at 7). While the Court does not rely on these allegations for

Thus, the Court concludes that standing is proper where allegation of environmental harms to particular members of the Plaintiff organizations are sufficiently concrete.[12]

VI. REQUIRING THE PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT ON THE NAFTA BEFORE ITS SUBMISSION TO CONGRESS IS REQUIRED BY THE CLEAR LANGUAGE OF THE NEPA AND IS CONSISTENT WITH THE POLICIES BEHIND IT.

Having determined that the APA and the NEPA apply to the NAFTA, the plain language of the NEPA makes it a foregone conclusion that the OTR must prepare an EIS on

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purposes of standing, it does note that an EIS would help to clarify the extent and scope of the environmental impact of the NAFTA. *See supra* Section VI.

[12] The Court also notes that the Plaintiffs also allege standing on the basis of an injury to their organizational interests by claiming that they are unable to keep their members adequately informed. The Supreme Court has stated that such injury is within the zone of interest that the NEPA was designed to protect. *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). Such claims of informational standing have been rejected where a plaintiff has been unable to identify any particular agency action as the source of injury. *Foundation on Economic Trends v. Lyng*, 943 F.2d 79 (D.C. Cir. 1991) (no EIS required for a federal agency's day-to-day operations). However, the Court is not convinced that such informational standing is wholly improper where the Plaintiffs are challenging a specific proposal for legislation such as the NAFTA.

the NAFTA.[13] The NEPA requires that all federal agencies "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" an environmental impact statement setting forth the environmental impact of the proposed action. 42 U.S.C. 4332(2)(C).[14] Furthermore, it is established law that "the policies, regulations and public laws of the United States shall be interpreted and administered with the policies of NEPA 'to the fullest extent possible.'" *Trustees for Alaska v. Hodel*, 806 F.2d 1378, 1382 (9th Cir. 1986) (*quoting* 42 U.S.C. § 4332; *citing Lathan v. Brinegar*, 506 F.2d 677, 687 (9th Cir. 1974) (en banc)). There is a narrow exception to the NEPA's EIS requirement only where compliance with the NEPA would result in a "clear and fundamental conflict of statutory authority." *Flint Ridge Development Co. v.*

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[13] The purposes of the NEPA are to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation...." 42 U.S.C. § 4321.

[14]The Court also notes that CEQ regulations require an EIS where federal actions "establish a precedent for future actions with significant effects or represent[] a decision in principle about a future consideration," 40 C.F.R. § 1508.27(b)(6), or "threaten[] a violation of Federal, State, or local law or requirements imposed for the protection of the environment," *id.* § 1508.27(b)(10), especially where those effects are "likely to be highly controversial." *Id.* § 1508.27(b)(4).

Scenic Rivers Ass'n., 426 U.S. 776, 791 (1976). However, such an exception is narrowly construed. *See Jones v. Gordon*, 792 F.2d 821 (9th Cir. 1986) (a 90-day time limit for issuing permits under the Marine Mammal Protection Act did not excuse compliance with the NEPA's EIS requirement). There is nothing in the fast track procedures or the Trade laws that specifies that the NEPA shall not apply to the NAFTA. The Court also notes that *other governmental entities, most notably the State Department, prepare EISs for international treaties*. 22 C.F.R. §§ 161.5(d), 161.7(d)(2) (1992). Furthermore, as the timetable for the NAFTA's submission to Congress is not explicit, the statutes here can be reconciled with the EIS requirement contained in the NEPA.[15]

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[15]The Defendant argues that requiring an EIS at this juncture will be unduly burdensome because there is inadequate time available for its preparation. However, the Court notes that the OTR could have very easily begun the EIS process earlier in the NAFTA negotiation process and thus any tight timetable for the preparation of an EIS on the NAFTA is entirely the result of the inaction by the prior administration.

In addition, our Court of Appeals noted that Congress retains the power to change its rules governing the fast track process and extend the statutory limit on its consideration of the NAFTA if it wishes to postpone such consideration until an EIS has been prepared. *Public Citizen v. Office of the United States Trade Representative*, 970 F.2d 916, 922 (D.C. Cir. 1992). Furthermore, it would be manifestly unjust to deny relief in this case on the grounds that there was inadequate time to prepare an EIS because the Plaintiffs brought their prior lawsuit specifically to ensure that they could obtain judicial review with ample time for the OTR to complete an EIS. *See Public Citizen v. Office of the United States Trade Representative*, 782 F. Supp. 139 (D.D.C.

Finally, the Court notes that the House of Representatives unanimously passed a resolution stating that "Congress will not approve legislation to implement any trade agreement if such agreement jeopardizes United States health, safety, labor, or environmental laws." H.R. Res. 246, 102nd Cong., 2nd Sess. (1992), and that certain Senators have requested that an EIS be prepared on the NAFTA.[16] Such events confirm that Congress is interested in the environmental effects of the NAFTA and would be aided by the preparation of an EIS.

VII. CONCLUSION

The NEPA, and the policies under it, clearly require that a federal agency prepare an environmental impact statement on every proposal for legislation significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C). The Court finds that the Plaintiffs have demonstrated that there is a reasonable risk that the NAFTA may cause environmental injury and the Court concludes that the actions of the Defendant Office of the United States Trade Representative in negotiating, drafting, and signing the NAFTA are subject to review under the APA and NEPA. Therefore, the Court shall enter summary judgment for the Plaintiffs and order that the Defendant prepare an environmental impact statement on the NAFTA with all deliberate speed.

The Court notes that this agreement was negotiated by President Bush and his Trade Representative Carla A. Hill, and thus this lawsuit should not be construed as a failure of

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1992) (June Green, J.); Plaintiffs' Brief in Support of its Motion for Summary Judgment, at 13.

[16] *See e.g.*, Plaintiffs' Exhibit Z (Letter from Senator Patrick Leahy to Carla A. Hills, dated March 26, 1992, at 3).

the present Administration. However, such an impact statement is essential for providing the Congress and the public the information needed to assess the present and future environmental consequences of, as well as the alternatives to, the NAFTA when it is submitted to the Congress for approval. *See Natural Resources Defense Council v. Morton*, 337 F. Supp. 165 (D.D.C.) (Richey, J.), *aff'd*, 458 F.2d 827 (D.C. Cir. 1972) (Leventhal, J.).

The Court shall enter an Order of even date herewith in accordance with this Opinion.

June 30, 1993
Date

/s/
Charles R. Richey
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, *et al.*,

Plaintiffs,

v. Civil Action
No. 92-2102 (CRR)

OFFICE OF THE UNITED STATES
TRADE REPRESENTATIVE

Defendant.

Filed
JUN 30 1993
NANCY M. MAYER-WHITTINGTON

ORDER

Before the Court are the parties' cross Motions for Summary Judgment in the above-captioned case. After careful consideration of the parties' Motions, all the papers filed in this case, and the applicable law, and for the reasons articulated in the Opinion of the Court of even date herewith, it is, by the Court, this *30th* day of June, 1993,

ORDERED that the Plaintiffs' Motion for Summary Judgment shall be, and hereby is, GRANTED; and it is

FURTHER ORDERED that the Defendant's Motion for Summary Judgment shall be and hereby is **DENIED**; and it is

FURTHER ORDERED that the Defendant Office of

the United States Trade Representative has acted contrary to law under the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*, by failing to prepare an Environmental Impact Statement on the North American Free Trade Agreement as required by the National Environmental Policy Act; and it is

FURTHER ORDERED that the Plaintiffs shall have a Declaratory Judgment that the Defendant Office of the United States Trade Representative must prepare an Environmental Impact Statement on the North American Free Trade Agreement pursuant to the National Environmental Policy Act, 42 U.S.C. § 4332; and it is

FURTHER ORDERED that the Defendant shall prepare such an Environmental Impact Statement forthwith, and that the Court retains jurisdiction to determine an appropriate schedule for the issuance of the aforementioned Environmental Impact Statement if there is a dispute between the parties as to a reasonable timetable for its preparation; and it is

FURTHER ORDERED that the above-captioned case shall be, and hereby is, **DISMISSED** from the dockets of this Court.

/s/
Charles R. Richey
United States District Judge

Administrative Procedure Act

5 U.S.C. § 702

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.. . .

5 U.S.C. § 704

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.. . .

National Environmental Policy Act

42 U.S.C. § 4332

The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall --

> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --
>
> (i) the environmental impact of

the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall

accompany the proposal through existing agency review processes . . ..

Council on Environmental Quality Regulations

40 C.F.R. § 1500.3

Parts 1500 through 1508 of this title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub. L. 91-190, 42 U.S.C. 4321 *et seq.*) (NEPA or the Act) except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*) section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977).. . . The provisions of the Act and these regulations must be read together as a whole in order to comply with the spirit and letter of the law. It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury. Furthermore, it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action.

40 C.F.R. § 1508.12

"Federal agency" means all agencies of the Federal Government. It does not mean the Congress, the Judiciary,

or the President, including the performance of staff functions for the President in his Executive Office.. . .

40 C.F.R. § 1508.17

"Legislation" includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

40 C.F.R. § 1508.18

"Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility.. . .

> (b) Federal actions tend to fall within one of the following categories:
>
> (1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*; treaties and international conventions and agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.